


# Ex Parte By Cinergy Communications Company with FCC Wireline Competition Bureau – July 22, 2004



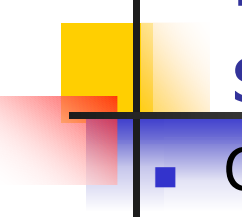
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BellSouth Request for Declaratory Ruling that State  
Commissions May Not Regulate Broadband Internet  
Access Service by Requiring BellSouth to Provide  
Wholesale or Retail Broadband Service

WC Docket 03-251

# Who is Cinergy Communications Company?

- Cinergy Communications Company (CCC) is a regional, privately held, CLEC offering voice, data and Internet access services to residential and business customers.
- Primarily serving customers in Kentucky, Tennessee and Indiana. CCC has been serving telecommunications customers in Kentucky since 1977. CCC also offers service in Ohio, Illinois, Missouri and Florida.
- CCC holds a CPCN and is preparing to offer services in the states of Alabama, Georgia, Michigan, North Carolina, Texas and Wisconsin.



# Why does CCC need wholesale access to BellSouth DSL service to provide advanced services to its customers?

- CCC's SuperLink VBX™ product, currently provided to mass market customers in Kentucky, requires broadband customer access.
  - Provides CCC's small business, home office and residential customers up to 4 voice grade equivalent (VGE) lines or less full-featured local service, long distance, voice mail, find me-follow me messaging services, and high speed Internet access over ADSL.
  - CCC purchases UNE loops from its BellSouth interconnection agreement. Enterprise customers (10 VGEs and above) are served by DS-1.
  - CCC cannot offer SuperLink VBX™ service to the 4 VGE and under market in Kentucky, Tennessee and in other BellSouth states without line-splitting access to BellSouth's DSL services. (January 30, 2004 Comments of Cinergy Communications Company, WC Docket No. 03-0251, at 4-5).



## Need for access to DSL (cont'd.)

- In Kentucky, there are no DSL providers other than BellSouth with whom CCC can partner to offer broadband services to its customers. CCC's markets in BellSouth's region are underserved by facilities-based DSL providers.
- In CCC's experience, Covad and other DSL providers in Kentucky and Tennessee serve far less than the 14% of central offices cited by AT&T in this proceeding.
- BellSouth's June 15, 2004 *ex parte* in this docket provides no hard information about competitive DSL coverage (other than competitors' generalized statements in press releases about plans for expanded DSL coverage across the U.S., not necessarily in BellSouth's region) in specific states in which BellSouth is the dominant provider, and certainly not states such as Kentucky and Tennessee in which CCC is currently serving customers.



# CCC's Kentucky Experience

- Kentucky has long required “line splitting,” by BellSouth providing DSL upon request to a CLEC UNE-P voice customer. Order, *An Inquiry Into the Development of Deaveraged Rates for Unbundled Network Elements*, Kentucky PSC Administrative Case No. 382 (December 18, 2001) at 36. (“BellSouth may not discontinue the provision of line splitting when a CLEC provides voice service through UNE-P, regardless of which XDSL provider is used.”) BellSouth had previously provisioned DSL on a resale basis only, but with significant operational barriers and at higher cost, with intention of preventing UNE-P providers from being able to offer bundled voice & data services to their customers.
- In December, 2001, CCC filed a petition for arbitration of its interconnection agreement with BellSouth with the Kentucky PSC pursuant to 47 U.S.C. § 252(b). Among the issues to be



# The Kentucky PSC Interconnection Arbitration Decision

decided was whether BellSouth would be required to provide BellSouth ADSL Service (BellSouth Tariff F.C.C. No. 1, Section 7.4.29, 6<sup>th</sup> Revised Page 7- 103.23, eff. Sept. 29, 2001) over UNE loops purchased pursuant to its interconnection agreement.

The Kentucky PSC held:

“BellSouth may not refuse to provide Digital Subscriber Line (“DSL”) service pursuant to a request from an Internet service provider who serves, or who wishes to serve, a customer who has chosen to receive voice service from a Competitive Local Exchange Carrier (“CLEC”) that provides service over the Unbundled Network Elements Platform (“UNE-P”).” Order, *Petition of Cinergy Communications Company for Arbitration of an Interconnection Agreement with BellSouth Telecommunications, Inc. Pursuant to 47 U.S.C. Section 252*, Case 2001-00432 (Kentucky PSC, October 15, 2002).



## The Kentucky PSC Decision (cont'd.)

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- The Kentucky PSC concluded that it did have jurisdiction over this issue and that FCC rulings on the jurisdictional nature of DSL are not pre-emptive: “We also have jurisdiction over the issue of whether BellSouth acts reasonably in refusing to provide DSL service to CLEC
- UNE-P customers under, inter alia, 47 U.S.C. § 252(e) and K.R.S. 278.280. The FCC’s determination on this issue is not, and does not purport to be, preemptive.” Order, Petition of Cinergy Communications Company for Arbitration of an Interconnection Agreement with BellSouth Telecommunications, Inc. Pursuant to 47 U.S.C. Section 252, Case 2001-00432 (Kentucky PSC, July 12, 2002), at 2. The Kentucky PSC ruling was based upon Kentucky statutory law as well as federal law.
- The Kentucky PSC approved the Cinergy/BellSouth arbitrated interconnection agreement on April 21, 2003. Since then, BellSouth has been providing its tariffed wholesale DSL transport service to Cinergy’s UNE-P customers in Kentucky.



# BellSouth Appealed in Federal District Court, Claiming Federal Pre-Emption

- BellSouth argued on appeal to the district court, as it does in its petition in WC Docket No.03-251, that the PSC's Order must fail because of federal preemption, that is, "as a matter of federal law, the Federal Communications Commission ("FCC") –not state commissions– has exclusive jurisdiction over interstate communications." *BellSouth Telecommunications, Inc. v. Cinergy Communications Co.*, 297 F. Supp.2d 946, 952 (D. Ky. 2003).
- The federal district court disagreed with BellSouth and affirmed the Kentucky PSC. Relying on *Michigan Bell Telephone Co. v. MCI Metro Access Transmission Services, Inc.*, 323 F.3d 348, 352 (6<sup>th</sup> Cir. 2003), the district court held that the Telecommunications Act of 1996 ("96 Act") incorporates the concept of "cooperative federalism" pursuant to which federal and state agencies "harmonize" their efforts and federal courts have oversight over this "partnership." In *Michigan Bell Tel. Co.*, the Sixth Circuit upheld a Michigan PSC decision to allow faxing of resale orders pursuant to state tariff as not frustrating the purposes of the Act. *Id.* at 360-361. Thus, *Michigan Bell Tel. Co.* instructs that the





The *Cinergy* court properly applied the “cooperative federalism” standard of 47 U.S.C. § 251(d)(3)(C) and *Michigan Bell Tel. Co.* to reject federal pre-emption.

- 96 Act accommodates state PUC requirements so long as they do not “substantially prevent” implementation of the 96 Act’s requirements. *See*, 47 U.S.C. § 251(d)(3)(C).
- The federal district court concluded that the Kentucky PSC Order requiring BellSouth to provide DSL service to a voice customer of a CLEC providing service over UNE-P:
  - establishes a relatively modest interconnection-related condition for a local exchange carrier so as to ameliorate a chilling effect on competition for local telecommunications regulated by the [Kentucky] Commission. The PSC Order does not substantially prevent implementation of federal statutory requirements and thus, it is the Court’s determination that there is no federal preemption.
  - *Cinergy*, 297 F. Supp. 2d at 953. This result tracks 47 U.S.C. § 251(d)(3)(C) which provides that “the Commission shall not preclude the enforcement of any regulation, order or policy of a State commission that--...(C) does not substantially prevent implementation of the requirements of this section and the purposes of this part.”).



## The *Cinergy* district court decision's pre-emption analysis comports with the 96 Act, *Michigan Bell Tel. Co.*, and the Commission's traditional pre-emption authority.

- Section 261(b), as well as Section 251(d)(3), of the 96 Act preserves the states' role in implementing additional requirements under Part II of the 96 Act that would foster local competition "if such regulations are not inconsistent with the provisions of this part." The states have their own powers preserved under the 96 Act to implement state law requirements under Sections 251(d)(3), 252(e)(3) ("Preservation of Authority" to enforce requirements of state law); and 261 (b)&(c).
- As the Commission has itself concluded in considering the exercise of its pre-emption authority, "Congress has made clear that the States are not ousted from playing a role in the development of competitive telecommunications markets." And the Commission has held that when "prescribing and enforcing rules to implement section 251, we are to preserve state access and interconnection rules that are 'consistent with the requirements of section 251' if they '[do] not substantially prevent implementation of the requirements of this section and the purposes of this part.'" *In the Matter of Public Utility Commission of Texas*, 13 FCC Rcd. 3460, ¶52 (1997).



## The Tennessee Regulatory Authority is Presently Considering this Issue in an Interconnection Arbitration Proceeding Pursuant to its Authority Under the 96 Act.

- BellSouth's FCC Tariff No. 1 (Issued: Oct. 2, 2003), Sec. 2.2.3, provides for commingled DSL transport access service with the purchase of UNEs from BellSouth, as specifically provided by 47 C.F.R. § 51.309(e) & (f) and paragraphs 579-584 of the TRO. BellSouth's tariff, and the parties' interconnection agreement in Tennessee, provide for good faith negotiation of changes of law amendments, and failing agreement, arbitration of any unresolved change of law issues before the state commission.
- CCC is presently arbitrating the issue of its entitlement to access to BellSouth's wholesale tariffed services in combination with its UNE-P services before the TRA. Reply briefs were filed in this arbitration proceeding on June 23, 2004 and a decision is expected within the next few months. *In Re: Petition of Cinergy Communications Company for Arbitration of an Interconnection Agreement with BellSouth Telecommunications, Inc. Pursuant to the Telecommunications Act of 1996*, Tennessee Regulatory Authority Docket No. 01-00987.



Rather than Preempt State decisions which comport with Federal Standards, the Commission should instead enforce BellSouth's non-compliance with the terms of its own federal access tariff and with Commission Rules.

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- Since at least November 5, 2003, BellSouth has refused to comply with 47 C.F.R. § 51.309(e) & (f) and BellSouth Tariff F.C.C. No. 1 Sec. 2.2.3 (issued October 2, 2003) in connection with negotiation of a multi-state change of law amendment to its interconnection agreement with BellSouth in the states of Alabama, Florida, Georgia, Louisiana, North Carolina and South Carolina. *See*, CCC's May 13, 2004 letter to FCC Requesting Acceptance of Filing of Formal Complaint under the Enforcement Bureau's Accelerated Docket Procedures.
- BellSouth's federal access tariff and Commission Rules 51.309(e) & (f) require BellSouth to commingle all access services purchased from its tariff with UNEs. Yet BellSouth refuses to allow Cinergy to commingle tariffed wholesale DSL access service with Cinergy's purchase of UNEs from BellSouth.
- Under the Triennial Review Order, n.1792, the Commission established specific penalties of \$7600 per offense, and \$330 for each day of a party's continuing offense in refusing to commingle wholesale tariffed



# BellSouth Non-Compliance with Commingling Rules (Cont'd)

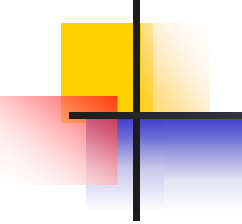
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services with UNEs. Based upon BellSouth's continuing refusal to agree to interconnection terms which comport with FCC Rules and BellSouth's own federal access tariff, BellSouth's continuing offense has reached 257 days, amounting to a potential penalty of at least \$92,410.



## How should the Commission decide BellSouth's Petition in WC Docket No. 03-0251?

- The Commission should leave this issue for the states to exercise their appropriate authority under Section 251(d)(3), 261(b) & (c), and 252(c), subject to the states' compliance with Part II of the Act.
- The states have a continuing role under the parties' interconnection agreements which specify state commission jurisdiction to arbitrate the implementation of any change of law amendments.
- Whatever the outcome of this proceeding, the Commission must ensure that BellSouth, under any circumstances, be required to comply with FCC Rules 51.309(e) & (f), and with the terms of its own federal access tariff (Sec. 2.2.3) permitting commingling of UNEs with BellSouth wholesale, tariffed services. The Commission recently declined to exercise jurisdiction under its Accelerated Docket procedures to consider CCC's request for enforcement of its Rules and BellSouth's federal access tariff, due at least in significant part, to the pendency of this proceeding.



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